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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 571

LEON F. CARROLL and DANIEL J. STEWART,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' BRIEF

CURTIS P. MITCHELL,
HENRY LINCOLN JOHNSON, JR.,
WILLIAM B. BRYANT,
Counsel for Petitioners.

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Opinions Below

There was no opinion in the United States District Court for the District of Columbia.

The opinion of the United States Court of Appeals rendered May 3, 1956 is reported at 98 U.S. App. D. C., 244, 234 F2d 679, and is contained in the certified transcript of record.

The petition for re-hearing was denied by the Court of Appeals on May 22, 1956. (R. 3615)

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was dated and entered May 3, 1956. (R. 31)

The petition for re-hearing was denied May 22, 1956. (R. 36)

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code and Rule 37(b) of the Federal Rules of Criminal Procedure.

Statutes Involved

United States Code

§ 28-1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code

§ 28-1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District Court of The Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

United States Code

§ 18-3731. Appeal by United States.

An appeal may be taken by and on behalf of the United States from the District Courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the District Courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof ex-

cept where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been ordered and shall be diligently presented.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken pursuant to this section, to the Supreme Court of the United States, which, in the opinion of that Court, should have been taken to a court of appeal, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

District of Columbia Code—1940 Edition

§ 23-105 [6: 355] Appeals by United States and District of Columbia.

In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions; Provided; That if on such appeal it shall be found that there was error in the rulings

of the court during a trial, a verdict in favor of defendant shall not be set aside. (Mar. 3, 1901, 31 Stat. 1341, ch. 854, § 935.)

District of Columbia Code—1940 Edition

§ 17-102 [16: 27] Court of Appeals—Appeals from Interlocutory orders in criminal case prohibited.

Nothing contained in any Act of Congress shall be construed to empower the United States Court of Appeals for the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding or to entertain such appeal heretofore or hereafter allowed or taken. (July 3, 1926. 44 Stat. 831, ch. 755.)

Federal Rules of Criminal Procedure, Rule 41(e).

(e) Motion for Return of Property and To Suppress Evidence

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the ground on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be

made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement of the Case

On February 12, 1954, officers of the Metropolitan Police Department executed certain affidavits upon which search warrants for various premises and arrest warrants for certain persons, including appellants herein, (R. Pg. 12) were issued by the United States Commissioner for the District of Columbia.

The arrest warrants for the appellants were executed on February 16, 1954. On April 26, 1954, an indictment (R. Pg. 3) was returned by the Grand Jury charging the petitioners, Leon F. Carroll and Daniel J. Stewart, together with one Norman H. Hall and one Sylvester C. Williams (neither of whom is a present party herein, the indictment as to them having been dismissed), with conspiracy in violation of the United States Code and with various violations of gambling statutes of the District of Columbia.

The petitioners upon arraignment respectively entered pleas of not guilty and thereafter filed motions to suppress evidence (R. Pg. 12) allegedly seized from their persons at the time of the arrest, on the grounds that there was lacking adequate probable cause for the arrests and searches and that petitioners' rights under the Fourth and Fifth Amendments to the Constitution had been violated. Similar motions were filed on behalf of Norman H. Hall and Sylvester O. Williams, the two individuals indicted along with the petitioners.

On January 10, 1955, which was prior to the trial date, the United States District Court for the District of Columbia (Chief Judge Bolitha J. Laws) denied the motions with re-

spect to the defendants Hall and Williams, but granted the motions with respect to the evidence obtained by virtue of the arrests of appellants Leon F. Carroll and Daniel J. Stewart (R. Pg. 12). The Court held that the warrants of arrest had been issued without probable cause.

From the order suppressing the evidence as to the appellants the United States of America appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the District Court and its judgment was entered on May 3, 1956. (R. 1) A petition for rehearing was denied by an order entered May 26, 1956. (R. 36)

Question Presented

Does the United States of America have the right to appeal from an order of the United States District Court for the District of Columbia suppressing evidence in a criminal case where the motion to suppress and the order are filed and entered after the indictment and prior to trial?

Summary of Argument

Where a motion to suppress evidence is filed after indictment and before trial in a criminal case, an order granting same is interlocutory, and the United States has no right to appeal therefrom.

Argument

The question whether an adverse ruling on a motion to suppress evidence[1] after indictment and prior to trial is appealable by a defendant in a criminal case has been an-

[1] A critical distinction has been made between a ruling on 'motion to suppress' on the one hand and on a 'motion to return property' on the other, the former being universally held to be interlocutory and the latter in some circumstances to be final. Cf. Steele v. U. S. 267 U. S. 498, 69 L.Ed. 757.

swered in the negative by this Court in the Cogen case.[2] No special legislation is invoked by the Court below, nor does any such warrant exist to permit such an appeal from a ruling where the government, rather than the defendant, complains of such a ruling adverse to it. However, contrary to the import and direct language of the *Cogen* case, supra, the court below comes to a contrary and erroneous conclusion, by adverting to the rationale of three decisions of this court,[3] and adopting the following criteria for determining the 'finality' of an otherwise, at least, purely interlocutory order:

> (a) if it has a 'final and irreparable effect on the rights of the parties', being a 'final disposition of a claimed right';
>
> (b) it is 'to important to be denied review'; and
>
> (c) the claimed right 'is not an ingredient of the cause of action and does not require consideration with'.

The court below justified its entertainment of the appeal in the instant case upon its own decision in *United States v. Cefaratti*, 91 U. S. App. D.C. 297, 202 F2d 13. The holding in *Cefaratti*, supra, represents the first, and only attempt to establish an order granting a Motion to Suppress evidence as a sufficiently final order to be covered by 28 U.S.C. (Supp. v.) § 1291. The rationale of the court was that (1) the appealed order had a final and irreparable effect upon the rights of the parties because it made acquittal inevitable if the government had gone to trial, and the government would have no appeal from that acquittal; (2)

[2] Cogen v. United States, 278 U. S. 221, 73 L.Ed. 275, at page 281; "The orders made on such applications, *so far as they effect the rights only of parties to the litigation, are interlocutory.*" (Emphasis supplied)

[3] Cohen v. Ben. Industrial Loan Corp. 337 U. S. 541; Swift v. Compania Col. Del Caribe, 339 U. S. 684 and Stack v. Boyle, 342 U. S. 1.

that it was too important to be denied review because under Rule 41(e), Federal Rules of Criminal Procedure, the property would not be admissible in evidence at any hearing or trial; and (3) that the claimed right to have the evidence returned "is not an ingredient of" and "does not require consideration with" the criminal charge against him.

But the Circuit Court fails to consider whether or not the order finally determined claims of right "separable from, and collateral to, rights asserted in the action . . . and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," and this appears to be the fourth critical element in the test of finality for purposes of appeal as outlined by the three cases.

It is to be noted that the Court in *Cefaratti*, supra, in determining whether the appealed order was or was not "an ingredient of" the criminal charge, speaks of ". . . appellee's right to have the narcotics returned to him."

The Order in this case is one granting a Motion to Suppress Evidence—not a Motion for the Return of Property; so obviously, the doctrine in *Cefaratti*, even if sound, could not apply.

Fundamentally, rulings on the use and admissibility of evidence in a criminal case are universally considered to be an integral part of a trial and inextricably interwoven into the fabric of the case on the merits as contradistinguished from the nature of a constitutional right to bond,[4] a statutory attachment,[5] or statutory right to security for costs.[6] Obviously the *Stack*, *Cohen* and *Swift* cases turned on matters which were not an indispensable and indisputable ingredient of trials generally. While no particular evidence is indispensable, the government is necessarily and always

[4] Stack v. Boyle, supra.

[5] Swift v. Compania, etc., supra.

[6] Cohen v. Ben. Loan Corp., supra.

restricted by the poverty of its own efforts. (*United States v. Janitz*, 161 F2d 19).

Petitioners suggest that the criteria of finality outlined in *Cefaratti*, supra, is an emasculated version of the requirements of finality as established by this Court in the *Cohen* and *Swift* cases, supra. The collateral nature of the matter concerned on appeal is then a sine qua non.

But even applying the abbreviated standard adopted by the Circuit Court appellants find it impossible to conceive of a ruling affecting the admissibility of evidence in a case as anything other than an ingredient of the cause of action itself.

This fact is buttressed by the very contention of the government that without the suppressed evidence its case fails. How can any factor collateral to a cause be at the same time vital to its maintenance?

It is the contention of the appellants that the proper rule would call for rejection of the *Cefaratti* holding. Petitioners find reassurance for this position in the latest expression of this Court on this matter in the case of *Baltimore Contractors, Inc., v. Bodinger*, 394 U. S. 176, 99 L.Ed. 233, at page 238 (January 1955). This Court seems to justify the rationale of the late Chief Judge Stephens in his dissenting opinion in the *Cefaratti* case, supra, by pointing out that any enlargement of the appellate jurisdiction should be a legislative, and not a judicial product. The language, because of its pertinency, and because the case was decided on January 10, 1955, with the *Cohen*, *Swift* and *Stack* cases in mind, as is evidenced by note 4, at 99 L.Ed. 237, would seem to gainsay the conclusion of the majority in the *Cefaratti* case, and support the view of the dissent. Beginning at page 238 of 99 L.Ed. and page 181 of 348 U. S., this Court says:

> "... No discussion of the underlying reasons for modifying the rule of finality appears on the legislative his-

tory, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of saving in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. *This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Westchester Service Corp. 293 U. S. 449, 451, 79 L.Ed. 583, 586, 55 S. Ct. 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent of or approval of the appellate court.*" (Emphasis supplied)

The Court below stated that "two counts of the indictment allege that the appellees had in their possession on the date they were arrested the numbers paraphenalia suppressed, it therefore, seems obvious that, at least with respect to those two counts in this case, as in *Cefaratti*, without the suppressed evidence the prosecution cannot succeed." Several questions of a serious nature arise.

Is Chief Judge Laws' Order of Suppression a final decision and thus appealable as to the misdemeanor counts of "possession," and at the same time not a final order and thus not appealable as it relates to the remaining felony counts of the indictment, since possession of the suppressed evidence is not an indispensable element of the felonies, but only a desirable evidentiary aspect of the government's case? Again, embracing the *Cefaratti* doctrine (including its lack of agreement with *Rossenwasser*, *Janitz* and *One Plymouth Coupe*, 161 F. 2d 3) can the government appeal on the mere representation that it will not be in possession of *sufficient evidence* to go forward successfully and consequently will dismiss the indictment because of its reluctance to proceed with a weak case which in all probability will be lost?

This is a dangerous innovation, because "*sufficient evidence*" by governmental standards can be a most relative thing. Anything less than *no evidence* fails to meet the *Cefaratti* test. We respectfully submit that the decision in the instant case is a classic example of the type of "ad hoc decisions" against which this Court cautions in the *Bodinger* case, supra.

There is no doubt that if the questions were decided during the trial, the ruling would be interlocutory and not independently appealable. The hearing prior to trial does not change the nature of the question nor its relationship to the case, and does not transmute the ruling into "final decision." *Waldron v. U. S.*, U. S. App. D. C. 12,075, January 13, 1955.

Finality does not depend on the right to obtain review after judgment, but upon the nature and relationship of the ruling made to the case in which it is entered. To be final for purposes of appeal under 28 U.S.C.A. 1291 a ruling must decide all litigated matters on the merits as contra-

distinguished from a preliminary order of the kind made in *Stack*, *Swift* and *Cohèn*, supra, deciding a matter that would not be an issue at trial. The order below falls in neither category and is not a final decision since the proceedings are clearly part of the trial. *Waldron* v. *U. S.*, supra and *Gatewood* v. *U. S.*, 93 App. D. C. 226.

That the Government would have no right to obtain a review of the ruling after judgment is of no importance since a statute restricts the Government's rights. Section 23-105, D. C. Code, 1950 Edition,[6a] removes from the scope of review available to the Government after judgment rulings at trial on questions of evidence. To hold that the order below is appealable would be to enlarge and expand the limits of review in criminal cases and in this instance would give the United States a right it has never had before. *United States* v. *Sanges*, 1892, 144 U. S. 310, 12 S. Ct. 609, 36 L.Ed. 445.

The right to review is a matter of legislative grace. The only authority for review prior to judgment is 28 U. S. C. A. 1292 which is not applicable here and which is strictly construed. Therefore, to hold in this case that a ruling on the admisibility of evidence is independently reviewable does not extend the *Cohen* and *Swift* doctrine, but creates a new one.

The Circuit Court of Appeals for the District of Columbia Circuit took a lone position in *Cefaratti*, supra, and with its decision in the instant case remains unique in this respect. At the time of the decision in 1952 the *Cogen* doctrine had been applied to this type of situation by the Third Circuit in *United States* v. *Janitz*, supra; by the Seventh Circuit in *United States* v. *One Plymouth Coupe*, 161 F. 2d 3; and by the Ninth Circuit in *United States* v. *Rosenwasser*, 145 F. 2d 1015, 1017.

[6a] Lette 17, Section 102, 1951 Ed. D.C. Code.

Then significantly, in 1955 (Nov. 7) three years after *Cefaratti*, supra, the Fourth Circuit decided a case on all fours with *Cefaratti*, except that the evidence was illicit liquor instead of narcotics, i.e. *United States* v. *Williams*, 227 F. 2d 149. In this latter case the Fourth Circuit Court of Appeals was as displeased with the Order granting suppression of the evidence as was the District of Columbia Circuit in *Cefaratti*, and devoted much space to pointing out that the District Court committed clear error; but then faced the issue of appealability and decided that the Order was interlocutory, citing this Court's *Cogen* case. It is to be presumed that Judge Parker was aware of *Cefaratti*, but significantly he did not treat with it at all.

Petitioners are puzzled and unable to resolve the positions taken by respondent when it urges the existence of statutory warrant for such appeals in this cause; while at the same time it decries the want, and beseeches the enactment of such legislation by the Congress.[7]

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[7] Hearing Before the Senate Subcommittee of the Committee on the Judiciary, 84th Congress, 2d Session, May 4, 1956 on S. 3760 (*Narcotic Control Act of 1956*) Suggestions and recommendations from Dept. of Justice by Deputy AG.

Section 1409 provides in substance, that the United States shall have the right to appeal from an order granting a motion to suppress evidence or return seized property made prior to the trial of a person charged with a violation of sections 1402, 1403, or 1404 of the bill, or with a violation of section 2 of the Narcotic Drugs Import and Export Act, or with a violation of any section of the Internal Revenue Code of 1954, . . . This section further provides that the United States attorney taking an appeal from an order granting such a motion shall certify to the judge who granted the motion that the appeal is not taken for purposes of delay and that the prosecution is unable to go forward without the evidence suppressed. . . .

The principal effect of this section is to work an amendment to the Criminal Appeals Act (18 U. S. C. 3731). *Since, in the present state of the law, an order suppressing evidence entered after an indictment or information is filed is interlocutory in character and not appealable (e.g., United States v. Janitz, 161 F.2d 19 (C. A. 3), this section proposes a salutary change in the right direction. In limiting the right to appeal, however, to orders to suppress or to return evidence entered before trial*

Conclusion

It is respectfully submitted that the court below committed error when it entertained the Government's appeal from the Order of the District Court suppressing evidence in the pending criminal proceeding, since such Order was interlocutory, and not final within the contemplation of applicable statutes.

Wherefore, it is submitted that the decision of the court below should be reversed.

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only in narcotic cases and then only when the Government can certify that such evidence is indispensable to going forward with the prosecution, this section fails to achieve the desired reforms of the Criminal Appeals Act contained in H. R. 9364 and S. 3423 (84th Cong., 2d Sess.).

Because H. R. 9364 and S. 3423 will apply to all criminal cases, including those covered by section 1409 of the subject bill, and will give the Government a broader right to appeal than does section 1409, they appear to be preferable to that section. These bills, with their expanded rights of appeal, would, when applied to narcotic cases, provide more effective enforcement and prosecution than would section 1409 of the subject bill. (Congress turned a deaf ear to this plea) [Emphasis supplied].